



## COMMONWEALTH OF MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

D.T.C. 13-6

January 31, 2014

Investigation by the Department on its Own Motion to Determine whether an Agreement entered into by Verizon New England Inc., d/b/a Verizon Massachusetts is an Interconnection Agreement under 47 U.S.C. § 251 Requiring the Agreement to be filed with the Department for Approval in Accordance with 47 U.S.C. § 252

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### HEARING OFFICER RULING ON MOTION TO COMPLY WITH HEARING OFFICER RULING AND PROTECTIVE ORDER

#### I. INTRODUCTION

In this ruling, the Department of Telecommunications and Cable ("Department") addresses the request of Sprint Communications Company L.P., Sprint Spectrum L.P. and Virgin Mobile L.P. (collectively "Sprint"); XO Communications Services, Inc. ("XO"); CTC Communications Corp. d/b/a EarthLink Business; Lightship Telecom LLC d/b/a EarthLink Business; Choice One Communications of Massachusetts, Inc. d/b/a EarthLink Business; EarthLink Business, LLC (formerly New Edge Network, Inc. d/b/a/ EarthLink Business); Cbeyond Communications, LLC; tw data services llc; Level 3 Communications, LLC; and PAETEC Communications, LLC (collectively the "Competitive Carriers") that the Department: (1) find that Verizon New England Inc., d/b/a Verizon Massachusetts' ("Verizon MA's") designation of the documents submitted to the Department on May 30, 2013 ("May 30 Documents") as Highly Sensitive Confidential Information ("Highly Confidential") is a violation of the Hearing Officer's Ruling on Petitions for Intervention, Request for Limited Participation Status, Motion for Admission *Pro Hac Vice*, Motion for Confidential Treatment,

Non-Disclosure Agreements, and the Other Party to the Agreement (June 28, 2013) (“Confidentiality Ruling”); (2) find that Verizon MA’s designation of the May 30 Documents is contrary to the terms of the Protective Agreement; (3) compel Verizon MA to produce a Confidential, but not Highly Confidential, version of the May 30 Documents; and (4) admonish Verizon MA to avoid over-designation of materials as Highly Confidential. For the reasons discussed below, the Department denies the Competitive Carriers’ motion and finds it permissible for Verizon MA to designate the entirety of the May 30 Documents as Highly Confidential under the Protective Agreement. The Competitive Carriers have not established such designation violates the Confidential Ruling or Massachusetts law and public policy.

## II. BACKGROUND

On May 30, 2013, in response to a Department order of May 13, 2013, Verizon submitted the May 30 Documents. Verizon sought confidential treatment for the May 30 Documents, which the Department granted on June 28, 2013. Confidentiality Ruling at 7. The Department directed intervenors seeking access to the May 30 Documents to negotiate a mutually acceptable non-disclosure agreement with Verizon MA. *Id.* at 15. On August 6, 2013, intervenors and Verizon MA reached agreement on the Protective Agreement. The Protective Agreement contains two tiers of treatment for confidential materials, Confidential and Highly Confidential. Protective Agreement at 2-3, ¶ 3; 5, ¶ 6. Disclosure of Confidential information to a receiving party is limited to the party’s attorney, the attorney’s staff that is actively engaged in the proceeding, and the party’s technical experts, consultants, witnesses, and persons employed in their respective offices actively engaged in the proceeding. *Id.* at 2-3, ¶ 3. Disclosure of Highly

Confidential information to a receiving party is limited to outside counsel, outside consultants, and in-house personnel that meet specific criteria (“Highly Confidential Personnel”).<sup>1</sup> *Id.*

On December 9, 2013, the Competitive Carriers filed a Motion to Comply with Hearing Officer Ruling and Protective Order (“Competitive Carriers Motion”), asserting that Verizon MA’s Highly Confidential designation of the entirety of the May 30 Documents is an inappropriate over-designation, contrary to the terms of Protective Agreement, and inhibiting the Competitive Carriers meaningful participation in the proceeding in violation of the Confidential Ruling, Massachusetts law, and public policy. On December 16, 2013, Cox Rhode Island Telecom LLC (“Cox”) and Charter Fiberlink MA – CCO, LLC (“Charter”) filed comments in support of the Competitive Carriers’ motion (“Cox and Charter Comments”). Verizon MA, also on December 16, 2013, filed its opposition to the Competitive Carrier’s Motion (“Verizon MA Opposition”). On December 23, 2013, the Competitive Carriers filed a reply in support of their motion with an accompanying Motion for Leave to File Reply (“Motion for Leave”).

### III. THE COMPETITIVE CARRIERS’ MOTION FOR LEAVE TO FILE REPLY

As an initial matter, the Department grants leave for the Competitive Carriers to reply and accepts the reply into the record. The Department’s procedural regulations allows a party to motion for leave to file response documents (220 C.M.R. § 1.04(5)) and it is within the Department’s discretion whether to accept such motions (220 C.M.R. § 1.06 (6)). The Department will typically balance the potential for additional insight against the need for

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<sup>1</sup> Highly Confidential information sent to a receiving party may only be viewed by outside counsel and consultants and those persons regularly employed in such offices and actively engaged in the conduct of the proceeding; in-house counsel, as long as such counsel is not involved in negotiating or advising with respect to wholesale agreements with the producing party or making competitive decisions (including, but not limited to marketing or business planning activities) on behalf of the receiving party in competition with the producing party and shall be the earlier of two years or execution of a written agreement between the receiving party and the producing party to exchange voice traffic in IP format; and in-house personnel working with and under the direction of counsel as long as such personnel are not involved in negotiating or advising with respect to wholesale agreements or making competitive decisions (including, but not limited to marketing or business planning activities) on behalf of the receiving party. *Id.* at 5, ¶ 6.

conducting an efficient proceeding. *See Investigation by the Dep't of Telecomms. & Energy on its own motion as to the propriety of the rates & charges set forth in the following tariff: M.D.T.E. No. 14, filed with the Dep't on June 16, 2006, to become effective July 16, 2006, by Verizon New England Inc. d/b/a Verizon Mass., D.T.C. 06-61, Order on Clarification & Partial Reconsideration at 7 (May 11, 2012).* The Competitive Carriers' Motion for Leave is uncontested. Granting leave to reply will not hinder the progression of the proceeding and may add additional insight for the Department's consideration of the Competitive Carriers' motion. As such, the Department, in its discretion, grants Competitive Carriers' Motion for Leave. 220 C.M.R. § 1.06 (6).

#### IV. ANALYSIS AND FINDINGS

Addressing the Competitive Carriers' motion, the Department determines: (1) that Verizon MA may designate the entirety of the May 30 Documents as Highly Confidential under the terms of the Protective Agreement; and (2) that Verizon MA's designation of every section of the May 30 Documents as Highly Confidential does not violate the Confidentiality Ruling or Massachusetts law and public policy.

##### A. Verizon MA May Designate May 30 Documents in their Entirety as Highly Confidential under the Protective Agreement.

Under the Protective Agreement, a party may designate information Confidential if the party deems the information confidential, proprietary, or competitively sensitive. Protective Agreement at 2, ¶ 1. Persons receiving Confidential information on behalf of a receiving party must execute a certificate acknowledging they have read the Protective Agreement and will not divulge or use the Confidential information for any purpose other than the preparation for and conduct of this proceeding or any continuation of the proceeding. *Id.* at 2-3, ¶¶ 2-3. A party may designate as Highly Confidential information that not only meets the Confidential criteria,

but which also includes: (1) customer specific information; (2) contractual information that is competitively sensitive; or (3) business operations or financial information that is commercially sensitive. *Id.* at 5 ¶ 6. The Protective Agreement does not require a producing party to prove the need for Highly Confidential designation, but does allow parties to contest Highly Confidential designation. *Id.* at 6-7, ¶ 7.

The definition of Highly Confidential information is intended to provide a mechanism for a party to protect its most sensitive information from personnel involved in negotiating or advising with respect to wholesale agreements or other competitive decisions within a competitor, whose knowledge of the information would provide the competitor with a clear competitive advantage over the party disclosing the information.<sup>2</sup> *See* Protective Agreement at 5-6, ¶ 6. Thus, to determine whether the Highly Confidential designation is appropriate, the Department must determine whether: (1) the entirety of the May 30 Documents fit into at least one of the categories of Highly Confidential information; and (2) it is appropriate for Verizon MA to protect the entirety of the May 30 Documents from personnel involved in negotiating or advising with respect to wholesale agreements or other competitive decisions within a competitor, whose knowledge of the information would provide the competitor with a direct advantage over the party disclosing the information.

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<sup>2</sup> The Department disagrees with the Competitive Carriers' characterization that in order to use Highly Confidential Designation it must be presumed the receiving party will violate the Protective Agreement by using Confidential Information outside of the proceeding. Competitive Carriers' Reply at 4. A reasonable and established practice in protective agreements is to include a Highly Confidential designation that limits access to information in addition to use in order to protect the producing party from a competitive disadvantage as long as the provision does not inhibit the receiving party's meaningful participation in the proceeding. *See e.g., Proceeding by the Dept. of Telecomms. and Energy on its own Motion to Implement the Requirements of the FCC's Triennial Review Order Regarding Switching Mass Market Customers*, D.T.E. 03-60, *Protective Order* (Oct. 1, 2003).

1. The entirety of the May 30 Documents constitutes competitively sensitive contractual information under the Protective Agreement.

The Department agrees with all parties that in order to have a Protective Agreement with a two-tiered confidentiality designation, there must be a clear distinction between the Confidential and Highly Confidential tiers. *See* Competitive Carriers Motion at 4; Verizon MA Opposition at 4-5; *see also* Cox and Charter Comments at 2-3 (contending that the Highly Confidential designated should be limited to information in a document relating to prices, measurements, metrics, and other information specially negotiated between the parties). The Department also agrees with the Competitive Carriers' assertion that the party utilizing the Highly Confidential designation must be able to justify its use. *See* Competitive Carriers Motion at 10. However, unlike Confidential treatment, which requires a party to overcome a statutory presumption that information submitted to the Department is public,<sup>3</sup> a party does not need to provide a justification for its use, absent a challenge to the use of the designation from a receiving party. *See* Protective Agreement at 6-7, ¶ 7. In addition, the receiving party's challenge to the Highly Confidential designation must be more than an assertion of improper designation; it must state the specific grounds upon which the receiving party is challenging such designation. *See* 220 C.M.R. 1.04(5)(a).

After consideration of the relevant pleadings, the Department finds that the Protective Agreement permits Verizon MA to designate the entirety of the May 30 Documents as Highly Confidential. The Protective Agreement allows a party to designate as Highly Confidential contractual information that is competitively sensitive. Protective Agreement at 5, ¶ 6. On its face, this provision allows the producing party to review the terms of an agreement and designate

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G.L. c. 25C, § 5.

each portion that contains competitively sensitive information as Highly Confidential, up to and including the entire document. As such, if Verizon MA can justify the designation, a burden which the Department finds below that Verizon MA has met, the Protective Agreement permits the entirety of the May 30 Documents to be designated Highly Confidential.

2. Under the Protective Agreement, it is appropriate for Verizon MA to protect the entirety of the May 30 Documents.

The Department, having found that the entirety of the May 30 Documents may be designated Highly Confidential, next determines whether the designation is warranted. Specifically, the question before the Department is whether it is appropriate to limit a receiving party's ability to review the May 30 Documents to the Highly Confidential Personnel. For the reasons discussed below, the Department finds the limitation appropriate.

The Department is persuaded that the entirety of the May 30 Documents is competitively sensitive contractual information warranting Highly Confidential designation. The Department accepts Verizon MA's argument that a competitor negotiating with Verizon MA for an agreement to exchange voice traffic in IP format may benefit from knowledge of the provisions in the May 30 Documents and it cannot be predicted with certainty, which terms, including boilerplate, would give a negotiating competitor a competitive advantage. Verizon MA Opposition at 7. As Verizon MA asserts, it is for this reason that many contracts between commercial entities are kept confidential in their entirety. *Id.* at 5.

This argument is consistent with the Department's prior precedent in this docket. In the Confidentiality Ruling, the Department agreed that disclosure of the May 30 Documents could potentially give competitors a negotiation advantage over Verizon MA, and that unless the Department found the May 30 Documents to be an interconnection agreement subject to 47 U.S.C. § 252, there was no other basis presented for public disclosure of the documents.

Confidentiality Ruling at 11. While the Department's grant of confidential treatment to the May 30 Documents was not a determination that the May 30 Documents are Highly Confidential, it explicitly considered the competitive advantage that may be afforded Verizon MA's competitors.

*Id.* The Department is not persuaded that similarities between the terms in the May 30 Documents and interconnection agreements ("ICAs") generally, or the presence of other publicly known information justifies limiting the Highly Confidential designation to only portions of the May 30 Documents.

While generally known or public information is not confidential, it may be appropriate to retain such information as confidential where the public and private information is so entwined that it would be impractical or infeasible to separate the public from the private materials or where competitively sensitive information as presented in a specific format warrants confidential protection even though it contains some public information. *See In re Pet. of Choice One Commc'ns of Mass. Inc., Conversent Commc'ns of Mass. Inc., CTC Commc'ns Corp. and Lightship Telecom LLC for Exemption from Price Cap on Intrastate Switched Access Rates as Established in D.T.C. 07-9, D.T.C. 10-2, Hearing Officer's Ruling Regarding Motion of One Communications for Confidential Treatment* at 11 (May 23, 2011) (granting confidential treatment to a contiguous document making a single and cohesive argument ,containing entwined public and confidential data); *Complaint of Choice One Communications of Massachusetts Inc., Conversent Communications of Massachusetts, LLC, CTC Communications Corp., and Lightship Telecom, LLC (collectively, "One Communications"), Concerning Alleged Unlawful Charges Imposed by Verizon New England Inc., d/b/a Verizon Massachusetts for Access Toll Connecting Trunk Ports*, D.T.C. 08-3, *Order* at 9-11 (Apr. 9, 2009) (granting confidential treatment to a comprehensive and detailed summary of finding, finding it



collectively constitutes competitively sensitive information). While, some general information relating to the content of the May 30 Documents has become known during this proceeding (*see* Competitive Carriers Motion at 12-13), the availability of that information does not warrant disclosure of limited pieces of the contractual provisions, where such disclosure is impractical and the presentation of the information in a specific format is a factor in determining the entirety of the information is competitively sensitive. In addition, while some similarities between the terms of existing ICAs and the May 30 Documents could exist, the extent of the similarities may actually provide useful information for an IP interconnection agreement and, as such, those similarities should be kept competitively sensitive, at least pending the outcome of this proceeding.

B. Verizon MA's Designation of the May 30 Documents in their Entirety as Highly Confidential does not Violate the Confidentiality Ruling or Massachusetts Law and Public Policy.

The Department finds that designation of the entirety of the May 30 Documents as Highly Confidential does not inhibit any party from meaningful participation in this proceeding and therefore does not violate the Confidentiality Ruling or Massachusetts law and public policy.

The Competitive Carriers argue that Verizon MA's use of the Highly Confidential designation to protect the entirety of the May 30 Documents fails to balance Verizon MA's ability to maintain the confidential nature of its proprietary materials with an intervenor's right to participate meaningfully in the proceeding as required by the Confidentiality Ruling.

Competitive Carriers Motion at 6. The Competitive Carriers claim to have in-house personnel that can provide meaningful analysis to the Department to develop a full and complete record if permitted access to all but the most competitively or commercially sensitive contract terms of the May 30 Documents. *Id.* at 14-15. Cox and Charter agree that the Highly Confidential

designation for the entirety of the May 30 Documents constrains their meaningful participation, asserting that to determine whether the May 30 Documents constitutes an ICA, limitations on intervenors abilities to review those documents should be strictly limited to information relating to prices, measurements, metrics, and other information specially negotiated between the parties. Cox and Charter Comments at 2-3.

While the Department does not doubt that the Competitive Carriers' in-house personnel would be able to provide meaningful analysis if allowed to view the May 30 Documents, the potential added value of additional in-house personnel having access to review the May 30 Documents alone is insufficient to establish that Verizon MA's use of the Highly Confidential designation for the entirety of the May 30 Documents violates the terms of the Confidentiality Ruling or Massachusetts law and public policy. The Competitive Carriers' arguments suggest that they and intervenors generally may be able to participate more efficiently and perhaps more effectively with portions of the May 30 Documents available without limitation to experienced in-house personnel. Competitive Carriers Motion at 14-15. Verizon MA, however, is correct that missing from the Competitive Carriers' argument are details of how the Highly Confidential designation as written or as applied to the May 30 Documents hinders it meaningful participation. Verizon MA Opposition at 9.

Critical to the Departments analysis is that the Competitive Carriers do not explain the actual effect limiting in-house personnel's access to the May 30 Documents has on their participation. For example, there is no discussion of the staffing or resource limitations, resulting from Highly Confidential restrictions on in-house personnel, that effectively bars meaningful participation. At most, the Competitive Carriers provide a cursory statement that the choice of allowing in-house personnel to review the May 30 Documents is a false choice because

of the two-year limitation on negotiating or advising with respect to wholesale agreements or other competitive decisions with Verizon MA and related entities. *See* Competitive Carriers Motion at 14 n.8. This claim without more is an insufficient explanation of how the Competitive Carriers would be in either practice or effect unable to participate meaningfully without the requested relief.

Without an explanation of the burden of relying on outside counsel and outside consultants and the infeasibility of restricting in-house personnel to the terms of the Protective Agreement, the Department is unable to conclude that Verizon MA designation of the entirety of the May 30 Documents as Highly Confidential inhibits the Competitive Carriers' meaningful participation in the proceeding. Therefore, the Department finds Verizon MA designation of the entirety of the May 30 Documents as Highly Confidential does not violate the Confidentiality Ruling or Massachusetts law and public policy.

#### V. CONCLUSION

The Department finds that Verizon MA may designate the entirety of the May 30 Documents as Highly Confidential under the Protective Agreement. The entirety of the May 30 Documents constitutes competitively sensitive contractual information entitled to Highly Confidential designation under the Protective Agreement. Therefore, it is appropriate for Verizon MA to designate the May 30 Documents as Highly Confidential under the terms of the Protective Agreement. The Department also finds the Competitive Carriers have failed to establish that Verizon MA's designation of the entirety of the May 30 Documents as Highly Confidential inhibits their ability to participate meaningfully in the proceeding. As such, the Department finds that the designation of the entirety of the May 30 Documents as Highly Confidential does not violate the Confidentiality Ruling or Massachusetts law and public policy.

Accordingly, the Department DENIES the Competitive Carriers' motion and the requested relief.

/s/ Michael Scott

Michael Scott  
Hearing Officer

NOTICE OF RIGHT TO APPEAL

Under the provisions of 220 C.M.R. § 1.06(d)(3), any aggrieved party may appeal this Ruling to the Commissioner by filing a written appeal with supporting documentation within five (5) days of this Ruling. A copy of this Ruling must accompany any appeal. A written response to any appeal must be filed within two (2) days of the appeal.